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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RALPH GORDON, Defendant and Appellant.	E068521 (Super.Ct.No. FWV17000054) OPINION

APPEAL from the Superior Court of San Bernardino County. Jon D. Ferguson, Judge. Affirmed.

Forest M. Wilkerson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Ralph Gordon appeals after the transfer of his probation from Los Angeles County to San Bernardino County. Upon the transfer, the San Bernardino County Probation Department recommended additional terms and conditions of probation "to ensure compliance of the offender and for Officer Safety." Defendant objected to some of the new conditions, including the addition of an electronic device search condition. On appeal, defendant argues (1) the San Bernardino County Superior Court had no jurisdiction to add terms not previously imposed in Los Angeles County because no change in circumstances existed to justify the additional terms; (2) the condition requiring him to submit to search and seizure of any electronic device must be stricken because it is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), unconstitutionally overbroad, and significantly more invasive than necessary to serve any state interest in reformation and rehabilitation; and (3) the condition requiring him to obtain the probation officer's written permission before leaving the state must be stricken because it is unconstitutionally overbroad, and impermissibly infringes on his right to travel. We reject these contentions and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND[1]

On October 20, 2015, defendant, who was the driver of a four-door vehicle, was involved in a road rage incident after he was cut off by the victim, who was riding a motorcycle. Defendant became angry with the victim, drove across several lanes of traffic to get in front of the victim, and then stopped his vehicle abruptly, causing the victim to slam into defendant's vehicle and suffer serious injuries. After the victim crashed into defendant's vehicle, defendant got out of his car and snapped photographs of the prone victim with his mobile telephone while saying, "That's what you get, [expletive]."

On November 17, 2015, an information was filed in Los Angeles County charging defendant with assault with a deadly weapon, to wit, a vehicle (Pen. Code, § 245, subd. (a)(1)).[2] The information also alleged that in the commission of the offense, defendant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)).

On July 28, 2016, pursuant to a negotiated plea agreement, defendant pled no contest to assault by means of force likely to cause great bodily injury (§ 245,

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[1] A summary of the factual background is taken from the preliminary hearing transcript.

[2] All future statutory references are to the Penal Code unless otherwise stated.

subd. (a)(4)) and admitted the great bodily injury enhancement allegation.[3] In return, defendant was promised a grant of probation on various terms and conditions of probation.

On August 31, 2016, in accordance with his plea agreement, the Los Angeles County Superior Court placed defendant on probation on various terms and conditions of probation, including serving 90 days in county jail.

On December 23, 2016, the Los Angeles County Probation Department filed a notice and motion to transfer defendant's case to San Bernardino County. After the San Bernardino County Probation Department verified that defendant had permanently relocated to San Bernardino, the Los Angeles County Superior Court granted the motion to transfer defendant's case to San Bernardino County.

On March 27, 2017, the San Bernardino County Superior Court accepted jurisdiction over defendant and the matter was set for a probation modification hearing.

On April 20, 2017, the San Bernardino County Probation Department filed a report requesting additional terms and conditions in San Bernardino County, in order to ensure that officer safety and offender compliance were added to defendant's probationary terms and conditions. In relevant part, the proposed new terms and conditions were as follows:

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[3] The People amended the information by interlineation to charge defendant with assault by means of force likely to cause great bodily injury because defendant worked as a truck driver, and were he to plead guilty to the charged crime, he would permanently forfeit his driver's license.

"019A Not associate with persons known to defendant to be convicted felons or anyone actively engaged in criminal activity, or the co-defendant(s), except those involved in recovery/rehabilitative services.

"007 Not leave the State of California without first obtaining written permission of the Probation Officer.

"08F Permit visits and searches of places of residence by agents of the Probation Department and/or law enforcement for the purpose of ensuring compliance with the terms and conditions of probation; not do anything to interfere with this requirement, or deter officers from fulfilling this requirement, such as erecting any locked fences/gates that would deny access to Probation Officers, or have any animals on the premises that would reasonably deter, threaten the safety of, or interfere with officers enforcing this term.

"004A Report to the Probation Officer in person immediately or upon release and thereafter as directed. If you are removed from the United States, you are to report to the Probation Officer by phone or mail within fourteen (14) days of your release from immigration custody and inform Probation of your address and phone number.

"010B . . . [¶] Submit to search and seizure by a government entity of any electronic device that you are an authorized possessor of pursuant to PC 1546.1(c)(10)."

On May 30, 2017, the San Bernardino County Superior Court held a probation modification hearing. At that time, defense counsel objected to the electronic device search condition, arguing it violated defendant's Fourth Amendment right and as having

no "nexus or ties to the offense." Defense counsel also noted that there was no change of circumstances to allow the additional term. The trial court disagreed, ordered the additional terms and conditions, including the electronic device search condition, and continued defendant on probation. The court explained "as a . . . felony probationer, he does sacrifice some Fourth Amendment issues. The *Bravo*[4] search term is really more intrusive than that particular paragraph regarding electronic devices, certainly. And that is certainly an appropriate term of probation to impose in virtually every single case. Given this day and age, it seems to be an appropriate tool for the probation department to monitor [defendant]. I don't think it's overbroad. It seems to be easily related to felony probation as a felony probationer. [¶] And for those reasons—I'll note the objection. I will impose it. If it is something that becomes burdensome, and if he feels that the probation department is using that tool unfairly, he can certainly address it in the future." The court later noted that "I think it's a tool that's available to probation. I think it assist[s] their monitoring in supervising. I think I could add that term, if it's appropriate for our County. I think it is. [¶] And I mention *Bravo* because those are—that's certainly a waiver of his Fourth Amendment rights. No different than what's being asked in this case. So it will be imposed."

On June 7, 2017, defendant filed a timely notice of appeal.

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4 *People v. Bravo* (1987) 43 Cal.3d 600 (*Bravo*).

III

DISCUSSION

A. *Additional Conditions Due to Change in Circumstance*

Defendant argues the trial court acted in excess of its jurisdiction by imposing the additional terms and conditions recommended by the San Bernardino County Probation Department because the court's modification was not based on a change in defendant's circumstances. Specifically, defendant asserts that the transfer of supervision to San Bernardino County did not constitute a change in circumstances and, absent a change in circumstances, his probation conditions could not be modified.

The People respond the addition of the electronic device search condition was not a substantive change because it merely made explicit what was already implicit in the search condition imposed by Los Angeles County. The People also assert that even if the electronic device search condition was a substantive change, the January 2017 amendment to the Electronic Communications Privacy Act (ECPA) was a change in circumstances that justified the modification. The People further argue that the court had jurisdiction to modify defendant's probation conditions because a change in circumstances, namely responsibility for supervision of defendant was transferred to San Bernardino County, justified the modification.

A trial court generally has discretion in setting the appropriate terms and conditions of probation, parole, or supervised release: "In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the

reformation and rehabilitation of the offender, while protecting public safety. [Citations.] Thus, the imposition of a particular condition of probation is subject to review for abuse of that discretion. 'As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances. [Citation.]' [Citation.]" (*People v. Martinez* (2014) 226 Cal.App.4th 759, 764.)

Section 1203.9, subdivision (a)(1), governs the transfer of probation cases from one county to another and provides in pertinent part: "[W]henever a person is released on probation or mandatory supervision, the court, upon noticed motion, shall transfer the case to the superior court in any other county in which the person resides permanently, meaning with the stated intention to remain for the duration of probation or mandatory supervision, unless the transferring court determines that the transfer would be inappropriate and states its reasons on the record." Pursuant to subdivision (b) of section 1203.9, "The court of the receiving county shall accept the entire jurisdiction over the case effective the date that the transferring court orders the transfer."

The procedure for transferring a case to another county is outlined in California Rules of Court, rule 4.530. (See § 1203.9, subd. (f) [judicial council shall promulgate rules of court procedures for the transfer of probation cases].) Subdivision (h)(1)(B) of rule 4.530 provides: "The receiving court and receiving county probation department may impose additional local fees and costs as authorized." Further, subdivision (g) of rule 4.530 entitled "Transfer" provides in subsection (6), "Upon transfer the probation

officer of the transferring county must transmit, at a minimum, any court orders, probation or mandatory supervision reports, and case plans to the probation officer of the receiving county."

Neither section 1203.9 nor the California Rules of Court, rule 4.530 specifically address whether probation conditions can be modified upon transfer to another county.[5] Section 1203.3, subdivision (a), states "The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." This section "broadly states the court's power to modify." (*People v. Cookson* (1991) 54 Cal.3d 1091, 1100 (*Cookson*).) A defendant is subject to notice, a hearing, and reasons for the modification to be placed on the record before the modification. (§ 1203.3, subd. (b).)

A court can modify a term of probation at any time before the expiration of that term and need not wait until a probation violation occurs. (*Cookson, supra*, 54 Cal.3d at p. 1098; see *People v. Leiva* (2013) 56 Cal.4th 498, 505.) In *Cookson*, the defendant was ordered to pay restitution for diverting construction funds at the time that his probation was granted, but the probation department set up an incorrect payment schedule resulting in insufficient funds being paid by defendant on the restitution when his probation term was set to expire. (*Cookson*, at p. 1094.) The superior court extended the time for

[5] We leave to the Legislature clarification as to whether a transfer to another county qualifies in itself as a change in circumstances that authorizes a change in probation conditions, like the ability of the receiving county to change the fees and costs.

probation in order for the defendant to be supervised while completing the payments on restitution. (*Id*. at pp. 1094-1095.)

The California Supreme Court noted that "'An order modifying the terms of probation based upon the same facts as the original order granting probation is in excess of the jurisdiction of the court, for the reason that there is no factual basis to support it.'" (*Cookson, supra,* 54 Cal.3d at p. 1095, italics omitted.) Although the defendant had complied with all of the probation conditions, and the miscalculation of the monthly payments was solely the fault of the probation officer, our Supreme Court determined "the Court of Appeal correctly determined that a change in circumstance could be found in a fact 'not available at the time of the original order,' namely, 'that setting the pay schedule consistent with [the] defendant's ability to pay had resulted in defendant's inability to pay full restitution as contemplated within the original period of probation.'" (*Ibid*.)

Here, we conclude that the modification of defendant's probation conditions was proper. First, the San Bernardino County Probation Department recommended additional terms and conditions used in San Bernardino County to ensure officer safety and offender compliance. The transfer of the instant case from Los Angeles County to San Bernardino County constituted a fact not available at the time of the original order, namely the transfer of responsibility for defendant's supervision changed from Los Angeles County to San Bernardino County. Upon transfer, defendant's probation was overseen by a different and new probation officer, court and county, with different standards of practice

regarding probationers. The San Bernardino County Probation Department's suggested changes to the conditions were reasonably related to ensure officer safety and defendant's compliance and rehabilitation. The additional terms and conditions were aimed at ensuring defendant's rehabilitation. Defendant voluntarily moved to San Bernardino County and San Bernardino County is a large, spread-out county, the largest county in the continental United States. The San Bernardino County Superior Court was entitled to consider defendant's new circumstances when the case was transferred to San Bernardino County, and to apply new conditions appropriate in supervising San Bernardino County probationers.

Furthermore, the additional terms and conditions are reasonably related to preventing future criminality and necessary in aiding defendant's rehabilitation. (See *People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*) [test for valid probation conditions].) Term Nos. 019A (not associate with known felons), 007 (not leave state without written permission of probation officer), 08F (permit probation to visit and search residence), and 010B (submit to search and seizure of person and by a government entity of any electronic devices in probationer's possession) promoted the San Bernardino County Probation Department's ability to identify, supervise, and rehabilitate defendant. In fact, conditions 019A, 007, 08F, and 010B were no different than the conditions imposed in Los Angeles County requiring defendant to violate no law; carry at all times a valid identification card; cooperate and follow all reasonable directives of the

probation officer; and submit to immediate search of person, home, and property by a law enforcement officer.

Moreover, when defendant's original sentence was imposed pursuant to a negotiated disposition, he became subject to a warrantless search condition, which authorized a search of his person, property, vehicle, and home. When that condition was imposed, it was broad enough to embrace electronic devices like the phone defendant used to take a picture of the victim following the crash. Then, while defendant was still on probation, "there was a change of circumstance in that the ECPA established a new requirement that an electronic search probation condition must be clear and unambiguous. The fact that the probation search condition did not have the same meaning or impact that it had when the original sentence was announced demonstrates that the trial court had jurisdiction to modify the conditions of [defendant's] probation to include an express electronic search condition." (*People v. Guzman* (2018) 23 Cal.App.5th 53, 60 (*Guzman*).) The additional electronic device search condition is no more intrusive than the condition imposed in Los Angeles County requiring defendant to submit to immediate search of person, home, and property by a law enforcement officer.

As recently explained in *Guzman*, *supra*, 23 Cal.App.5th 53: "*People v. Sandee* (2017) 15 Cal.App.5th 294 (*Sandee*) supports our conclusion. In that case, the defendant was on probation when officers searched her cell phone pursuant to a 'general search condition which allowed authorities to search her "property" and "personal effects" without a warrant.' (*Id*. at p. 298.) The trial court denied a motion to suppress the cell

phone evidence, which was affirmed on appeal. The *Sandee* court found that at the time the search was conducted, a 'reasonable, objective person' would have understood that a search of the phone fell within the scope of the general search conditions in the defendant's probation orders. (*Ibid*.) The court reasoned that the defendant had agreed to submit her property and personal effects to search at any time, the probation search condition was broadly worded and contained no limiting language to exclude a cell phone or other electronic devices, and a 'reasonable person would understand the terms "property" and "personal effects" to include [defendant's] cell phone and the data on it.' (*Id*. at p. 302, fn. omitted.)

"The *Sandee* court rejected the contention that the cell phone evidence should have been suppressed under the ECPA, which went into effect after the search but prior to the suppression hearing. (*Sandee*, *supra*, 15 Cal.App.5th at pp. 304-306.) The court reasoned that '[a]s the ECPA was not in effect at the time of the search, a reasonable, objective person at the time of the search would not have understood the ECPA to restrict the scope of the search permitted by the probation orders.' (*Id*. at p. 305.) Thus, the court concluded that, while it may have been reasonable after the ECPA became effective 'for a law enforcement officer conducting a search to interpret a general probation search condition authorizing a warrantless search of the probationer's property as excluding searches of the probationer's electronic device information, such as cell phone data, we see no basis for a reasonable person to have reached that conclusion prior to the ECPA.' (*Ibid*., italics omitted.)

"Despite its different context, *Sandee* supports two conclusions that are material to our analysis. First, prior to the enactment of the ECPA, a broadly worded general search condition like the one in this case was reasonably construed as including electronic searches. Second, after the ECPA went into effect, even an unqualified general search condition is reasonably construed as precluding searches of electronic devices. These conclusions demonstrate that the enactment of the ECPA was a change of circumstance, which gave the court jurisdiction to modify [defendant's] warrantless search probation condition to explicitly authorize searches of electronic devices."[6] (*Guzman*, *supra*, 23 Cal.App.5th at pp. 60-61.)

In his reply brief, defendant asserts that the People waived the argument that the electronic device search condition was implicit in the *Bravo* search term because the People failed to assert this argument at the probation modification hearing. Defendant also contends that the People waived the argument that the ECPA constituted a change in circumstance justifying the electronic device search condition. We decline to find waiver under the circumstances of this case. The enactment of the ECPA established a new

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[6] The ECPA (§ 1546 et seq.) went into effect on January 1, 2016. (Stats. 2015, ch. 651, § 1.) The ECPA provides, in pertinent part, that a government entity shall not "[a]ccess electronic device information by means of physical interaction or electronic communication with the electronic device[,]" except under certain circumstances, including where the authorized possessor of the device specifically consents to the search. (§ 1546.1, subds. (a)(3), (c)(4); see *People v. Sandee*, *supra*, 15 Cal.App.5th at p. 304.) However, effective January 1, 2017, the ECPA was amended to provide that a government entity may physically access electronic device information "[e]xcept where prohibited by state or federal law, if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation . . . ." (§ 1546.1, subd. (c)(10); Stats. 2016, ch. 541, § 3.5.)

procedural requirement for subjecting a probationer in defendant's situation to an electronic device search condition. That changed circumstance—which arose while defendant was already serving probation pursuant to a warrantless search condition that did not preclude searches of defendant's electronic devices—gave the trial court jurisdiction to modify the warrantless search condition of defendant's probation.

Based on the foregoing, we conclude the San Bernardino County Superior Court had jurisdiction to modify the conditions of defendant's probation. The new additional conditions were reasonably related to the goal of maintaining supervision and safety of the officers, as well as, defendant's offenses and rehabilitation.

B. *Electronic Devices and Travel Approval Search Conditions*

Defendant contends the probation condition requiring him to submit his electronic devices to search or seizure by law enforcement officers is unreasonable under *Lent*, unconstitutionally overbroad in violation of the Fourth Amendment, and is significantly more invasive than necessary to serve any state interest in reformation and rehabilitation. He also argues the probation condition requiring him to obtain the probation officer's written permission before leaving the state is unconstitutionally overbroad because it infringes on his right to interstate travel. For the reasons explained below, we disagree.

1. Applicable Principles

A grant of probation is an act of clemency in lieu of punishment. (*People v. Moran* (2016) 1 Cal.5th 398, 402 (*Moran*).) Probation is a privilege, and not a right. A court has broad discretion to impose "reasonable conditions, as it may determine are

fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, . . . and generally and specifically for the reformation and rehabilitation of the probationer. . . ." (§ 1203.1, subd. (j); *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) "If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens."'" (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O'Neil*).)

A condition of probation will not be upheld, however, if it (1) has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. (*Olguin*, *supra*, 45 Cal.4th at pp. 379-380; see *Lent*, *supra*, 15 Cal.3d at p. 486.) Our high court has clarified that this "test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.)

However, "[j]udicial discretion to set conditions of probation is further circumscribed by constitutional considerations." (*O'Neil, supra,* 165 Cal.App.4th at p. 1356.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the

defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153; accord, *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346 (*Pirali*).)

We generally review the imposition of probation conditions for an abuse of discretion, and we independently review constitutional challenges to probation conditions de novo. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723.) Based on the foregoing, we address the merits of defendant's arguments below.

2. Electronic Device Search Condition—Analysis

Defendant challenges the electronic device search condition, which states: "Submit to a search and seizure by a government entity of any electronic device that you are an authorized possessor of pursuant to P[enal]C[ode Section]1546.1[, subdivision](c)(10)." Defendant argues that the electronic device search condition has no relationship to the crime of which defendant was convicted, and it involves conduct that is not itself criminal. Defendant further contends that the electronic device search condition is not reasonably related to future criminality because there was no evidence connecting his use of an electronic device to his offenses or to a risk of future criminal conduct. He also asserts that the condition is unconstitutionally overbroad in violation of the Fourth Amendment and his right to privacy.

The People assert that defendant cannot meet the first *Lent* factor because "an electronic device was used in direct relationship to the crime of which [defendant] was convicted." The People note that after intentionally causing the victim to collide with his vehicle and suffer severe injuries, defendant "mocked the victim while snapping photographs of him *with his mobile telephone*." The People further maintain that even if the electronic device search condition had no relationship to the crime, the electronic device search condition is reasonably related to preventing future criminality. (See *Olguin*, *supra*, 45 Cal.4th at p. 379.)

The issue of the validity of an electronic device search condition under *Lent* and its progeny is pending before our high court. (See, e.g., *People v. Ermin* (July 10, 2017, H043777) [nonpub. opn.], review granted Oct. 25, 2017, S243864; *People v. Nachbar* (2016) 3 Cal.App.5th 1122 (*Nachbar*), review granted Dec. 14, 2016, S238210; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.) We also note that currently there is a split of authority regarding the validity of broad electronic device search conditions of probation, and those cases are also pending before the California Supreme Court. (See *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*), review granted Nov. 29, 2017, S244650; *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937; *In re R.S.* (2017) 11 Cal.App.5th 239, review granted July 26, 2017, S242387; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted

Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re J.E.* (2016) 1 Cal.App.5th 795 (*J.E.*), review granted Oct. 12, 2016, S236628.) Until we receive further direction, we must undertake to resolve this case based on our construction of the applicable law.

Our colleagues in Division One of this court addressed a challenge by a defendant subjected to an electronic device search probation condition in *Trujillo*, *supra*, 15 Cal.App.5th 574, which we discuss in detail for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).) The defendant's crime had no relation to the probation condition, and the main issue, as here, is whether the condition was reasonably related to future criminality. The court explained that "a probation condition 'that enables a probation officer to supervise his or her charges effectively is . . . "reasonably related to future criminality."' [Citations.] Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. [Citations.] 'This is true "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted."'" (*Trujillo*, at p. 583, italics omitted.)

In *Trujillo*, our colleagues held the trial court did not abuse its discretion: "If the court permits this young convicted felon to avoid prison through probation despite his violent offenses, the court has the authority to take steps to help ensure Trujillo will remain crime free and that public safety objectives are satisfied. As our high court has

observed, the purpose of requiring Fourth Amendment search waivers as a probation condition is ‘“‘to determine not only whether [the probationer] disobeys the law, but also whether he obeys the law. Information obtained [from an unexpected and unprovoked search] afford[s] a valuable measure of the effectiveness of the supervision given the defendant . . . .’”’ [Citations.] The trial court had a reasonable basis to conclude the most effective way to confirm Trujillo remains law abiding is to permit his electronic devices to be examined, rather than relying on a meeting or a telephone conversation. This required Fourth Amendment waiver is not open-ended, it applies only during the probation period. If Trujillo is successful at his probation, the Fourth Amendment waiver will terminate and his electronic devices will again be completely private. The court made the factual determination that the electronics-search condition is necessary to provide appropriate supervision for Trujillo while he is on probation. Under *Lent* and *Olguin*, the court did not err in reaching this conclusion." (*Trujillo*, *supra*, 15 Cal.App.5th at pp. 583-584.) The *Trujillo* court further rejected the notion, suggested in cases such as *In re Erica R.* (2015) 240 Cal.App.4th 907, that the *Trujillo* defendant's failure to use an electronic device in committing his crimes or the lack of any connection between such a device and the crimes rendered the search condition unreasonable as a matter of law. (*Trujillo*, at p. 584.)

We are persuaded by *Trujillo*'s reasoning and apply it in this case. Moreover, pending further guidance from the Supreme Court, we take the *Olguin* opinion at its word: "A condition of probation that enables a probation officer to supervise his or her

charges more effectively is . . . 'reasonably related to future criminality.'" (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381.) In this case, the electronic device search condition at issue allows law enforcement to supervise defendant more effectively. His conditions of probation include violating no laws; cooperating and following all reasonable directives of the probation officer; not possessing dangerous or deadly weapons; and not knowingly associating with convicted felons or anyone actively engaged in criminal activity. Searching defendant's electronic devices will assist law enforcement in determining whether he is complying with these conditions. Indeed, given the current ubiquity of electronic communications and interactions, an electronic device search condition may well be the only way for a probation officer to discover the bulk of the information relevant to potential criminality and compliance with other conditions of probation. A defendant engaged in illegal activities, for example, is much more likely to have digital photographs or communications relating to such activities stored on an electronic device than print photographs and written correspondence stored at home. The electronic device search condition is therefore reasonably related to future criminality. (See *In re P.O.* (2016) 246 Cal.App.4th 288, 295; see *J.E.*, *supra*, 1 Cal.App.5th at p. 801; *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1176-1177.) We conclude the court did not abuse its discretion in ordering the condition under *Lent*, *supra*, 15 Cal.3d 481.

In our view, the electronic device search condition (and consequent burden) is akin to the standard three-way search condition—of a defendant's person, residence, and vehicles—routinely imposed as a condition of probation and required by regulation as a

condition of parole. (See, e.g., *People v. Ramos* (2004) 34 Cal.4th 494, 505-506; *People v. Burgener* (1986) 41 Cal.3d 505, 532, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753; *In re Binh L.* (1992) 5 Cal.App.4th 194, 202-203.) One appellate court recognized that a computer hard drive is the digital equivalent of its owner's home in terms of the breadth of private information involved. (*People v. Michael E.* (2014) 230 Cal.App.4th 261, 277, citing *United States v. Mitchell* (11th Cir. 2009) 565 F.3d 1347, 1351.) It follows that, just like a defendant's home, a computer hard drive is properly and reasonably the subject of a search condition. Defendant has not shown the trial court's imposition of the electronic device search condition encompassing such digital information was unreasonable or an abuse of discretion.

As noted, defendant also challenges the electronic device search condition as unconstitutionally overbroad in violation of the Fourth Amendment and his right to privacy. He relies on *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473] (*Riley*) to support his position.

"'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.'" (*Pirali, supra*, 217 Cal.App.4th at p. 1346.) Here, the

record reflects some evidence of the legitimate purpose of the restriction, as we have discussed above: preventing future criminality by promoting effective supervision. The condition may place a burden, in the abstract, on defendant's general right to privacy based on the possibility of a search of his electronic devices. But, as a defendant under probation supervision, his privacy rights are "diminished," i.e., they may more readily be burdened by restrictions that serve a legitimate purpose. (See *Nachbar*, *supra*, 3 Cal.App.5th at p. 1129; *J.E.*, *supra*, 1 Cal.App.5th at p. 805.) On the current record, we conclude the burden on defendant's privacy right is insufficient to show overbreadth, given the legitimate penological purpose shown for searching defendant's electronic devices.

Additionally, as our colleagues did in *Trujillo*, we reject defendant's argument that the electronic device search condition is unconstitutionally overbroad as violating his fundamental privacy rights under *Riley*, *supra*, 573 U.S. __ [134 S.Ct. 2473]. In *Riley*, the Unites States Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Riley*, at p. __ [134 S.Ct. at pp. 2482-2483].) The court explained that modern cell phones, which have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id*. at p. __ [134 S.Ct. at p. 2489].) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Riley*, at p. __ [134 S.Ct. at p. 2493].)

In *Trujillo*, the appellate court distinguished *Riley*, and followed authority explaining that the overbreadth analysis is materially different from the warrant requirement at issue in that case. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 587.) The court observed that probationers do not enjoy the absolute liberty to which law-abiding citizens are entitled, and that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant or reasonable cause. (*Id.* at pp. 587-588.) Like the defendant in *Trujillo* (*id.* at pp. 588-589), defendant does not challenge the probation condition authorizing officers to conduct random and unlimited searches of his residence at any time and for no stated reason, and he made no showing that a search of his electronic devices would be any more invasive than an unannounced, without-cause, warrantless search of his residence. Here, as in *Trujillo*, the record supports a conclusion that the electronic device search condition is necessary to protect public safety and to ensure defendant's rehabilitation during his probation period, and a routine search of defendant's electronic data "is strongly relevant to the probation department's supervisory function." (*Id.* at p. 588.) We adopt a similar conclusion as *Trujillo*: "Absent particularized facts showing the electronics-search condition will infringe on [defendant's] heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly drawn condition." (*Id.* at p. 589.)

The *Riley* court did not hold that electronic devices are immune from search, but only that they cannot be searched incident to lawful arrest as an ordinary exception to the warrant requirement. (See *Riley*, *supra*, 573 U.S. __ [134 S.Ct. 2473].) However, the instant case does not involve an exception to the warrant clause, as was the case in *Riley*. Rather, it involves a specific probation condition imposed by the trial court that restricts the exercise of the constitutional rights of defendant, who must be supervised for rehabilitation and prevention of crime. *Riley* is therefore inapposite since it arose in a different Fourth Amendment context. *Riley* also did not consider the constitutionality of conditions of probation, parole, or mandatory supervision. Persons on probation do not enjoy the absolute liberty to which every citizen is entitled and the court may impose reasonable conditions that deprive an offender of some freedoms enjoyed by law-abiding citizens. (*United States v. Knights* (2001) 534 U.S. 112, 119 [probationers]; see *In re Q.R.* (2017) 7 Cal.App.5th 1231, 1238, review granted Apr. 12, 2017, S240222 [*Riley* involved a person's "preconviction expectation of privacy"].)

Defendant insists the electronic device search condition is overbroad because the term "government entity" allows a "larger class of persons" to search his electronic devices than just law enforcement. The phrase search and seizure by any government entity, however, is paraphrased in the language of section 1546.1, subdivision (c)(10). In addition, "search and seizure by any government entity" means searches by law enforcement officers in light of the entire language used in term 010B. That term, specifically, provides: "Submit to a search and seizure of your person, residence and/or

property under your control, at any time of the day or night, without a search warrant by any law enforcement officer; and with or without cause. . . . [¶] Submit to search and seizure by a government entity of any electronic device that you are an authorized possessor of pursuant to P[enal]C[ode Section]1546.1[, subdivision](c)(10)." Probation conditions are interpreted with common sense and in context. (See *In re Ramon M.* (2009) 178 Cal.App.4th 665, 677.) Read in its full context, the phrase "government entity" means law enforcement.

We also reject defendant's claim that the electronic device search condition is invalid because it violates third-party privacy rights by requiring him to submit to search and seizure of any electronic device in his possession. Defendant did not raise this issue in the trial court and, as a result, has forfeited the argument on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at p. 885 [forfeiture rule applies to appellate claims of error "involving discretionary sentencing choices or unreasonable probation conditions"].) Defendant's claim also fails because he does not have standing to assert the rights of unidentified individuals who are not parties to this case. (*B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 947-948 ["courts will not consider issues tendered by a person whose rights and interests are not affected"].)

While searches involving electronic devices may raise unique issues of privacy not found in searches of these more traditional categories, we see no need to depart from our well-established treatment of search conditions whenever the condition implicates electronic devices. As *J.E.* explained, "courts have historically allowed parole and

probation officers significant access to other types of searches, including home searches, where a large amount of personal information—from medical prescriptions, banking information, and mortgage documents to love letters, photographs, or even a private note on the refrigerator—could presumably be found and read. [Citations.] In cases involving probation or parole house search conditions, we have found no instances in which courts have carved out exceptions for the same type of information [the minor] argues could potentially be on his electronics." (*J.E.*, *supra*, 1 Cal.App.5th at p. 804, fn. 6.) As we have explained, nothing in the record here justifies narrowing the challenged electronic device search condition.

Based on the foregoing reasons, we conclude the electronic device search condition is not unconstitutionally overbroad and does not substantially limit defendant's Fourth Amendment and privacy rights.

3. Travel Approval Condition—Analysis

Defendant also argues the probation condition requiring him to "[n]ot leave the State of California without first obtaining written permission of the Probation Officer" is unconstitutionally overbroad and infringes on his right to travel. The People respond defendant forfeited his constitutional challenge to the condition or, in the alternative, the People maintain the condition is valid.

Initially, we reject the People's claim defendant forfeited his constitutional challenge to the travel approval condition. Although the failure to make a timely objection to a probation condition ordinarily forfeits the claim of error on appeal, where a

claim that a probation condition is facially overbroad and violates fundamental constitutional rights is based on undisputed facts, it may be treated as a question of law which is not forfeited by failure to raise it in the trial court. (*Sheena K., supra*, 40 Cal.4th at pp. 881, 888-889; *People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1127 [forfeiture rule does not apply to defendant's contention that as a matter of law a probation condition, on its face, is unconstitutionally vague and overbroad].) Accordingly, we address defendant's claims on their merits.

The environment in which a probationer serves probation is an important factor as to whether the probation will be successfully completed, and thus, directly impacts the likelihood of effective rehabilitation. (*People v. Robinson* (1988) 199 Cal.App.3d 816, 818.) Although conditions requiring prior approval of a probationer's residence may affect the constitutional rights to travel and freedom of association (*People v. Bauer* (1989) 211 Cal.App.3d 937, 944), courts have the authority to do so if there is an indication the probationer's living situation contributed to the crime or would contribute to future criminality. (*People v. Soto* (2016) 245 Cal.App.4th 1219, 1228.)

Here, the travel approval condition is reasonable under the circumstances of this case. Although traveling outside of California is not itself criminal, and the condition is not related to the offenses defendant committed, the travel approval condition is reasonably related to preventing future criminality, as it assists the probation officer in his or her duty of supervising defendant. Leaving the state, especially for a long period of time, would interfere with the probation officer's ability to effectively supervise

defendant. It could also hinder defendant's rehabilitation and successful compliance with other probationary conditions. The travel approval condition enables the effective supervision of defendant and is reasonably related to future criminality. Moreover, the condition does not preclude defendant from traveling altogether, but rather simply requires him to obtain permission before doing so out of state. Therefore, the requirement that defendant obtain his probation officer's permission before leaving the state is narrowly tailored to the legitimate government interests of ensuring he complies with the terms of his probation and deterring future criminality. (See *O'Neil*, *supra*, 165 Cal.App.4th at p. 1355 [condition may impinge on a constitutional right where tailored to the purposes of rehabilitation and deterring future criminality]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624-626 [same].)

Defendant claims the probation condition gave probation unfettered discretion in deciding whether to allow defendant to leave the state. Contrary to defendant's contention, there is nothing to suggest that defendant's reasonable requests to travel out of state to visit relatives or friends would be disapproved. Our Supreme Court in *Olguin*, *supra*, 45 Cal.4th at page 382, stated that a probation condition "should be given 'the meaning that would appear to a reasonable, objective reader.'" We view the travel approval condition here in light of *Olguin* and presume a probation officer will not withhold approval for irrational or capricious reasons. (*Id*. at p. 383; see *People v. Stapleton* (2017) 9 Cal.App.5th 989, 996-997 ["A probation officer cannot issue directives that are not reasonable in light of the authority granted to the officer by the

court."]; *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240 [probation conditions are limited by reasonableness "[s]ince the court does not have the power to impose unreasonable probation conditions, [and therefore] could not give that authority to the probation officer"].)

Defendant also asserts that the travel approval condition is unconstitutionally overbroad and impermissibly infringes on his right to interstate travel. Defendant does not fully elucidate his argument with respect to how this particular probation condition is facially overbroad. Instead he simply asserts that it infringes on his right to travel. We disagree with the suggestion that a probation condition requiring a probationer to seek and obtain the approval of his or her probation officer before leaving the state is not sufficiently tailored and reasonably related to the compelling state interest of facilitating supervision and rehabilitation of the probationer. Indeed, "[i]mposing a limitation on probationers' movements as a condition of probation is common, as probation officers' awareness of probationers' whereabouts facilitates supervision and rehabilitation and helps ensure probationers are complying with the terms of their conditional release." (*Moran, supra,* 1 Cal.5th at p. 406.)

In fact, as defendant acknowledges, despite being frequently subjected to as-applied challenges regarding the proper scope, the imposition of travel restrictions subject to permission being granted by probation is regularly upheld. (See *People v. Relkin* (2016) 6 Cal.App.5th 1188, 1195-1196 (*Relkin*) [upholding against constitutional overbreadth challenge a probation condition similarly requiring defendant to obtain

written permission from probation officer prior to leaving state]; *In re Antonio R.* (2000) 78 Cal.App.4th 937, 942 [same].) "Although criminal offenders placed on probation retain their constitutional right to travel, reasonable and incidental restrictions on their movement are permissible." (*Moran, supra*, 1 Cal.5th at pp. 406-407.) Such a condition is in the public interest, as it assists the probation department in determining "defendant meets the standards of the Uniform Act for Out-of-State Probationer and Parolee Supervisions before he is allowed to go to another state (Pen. Code, § 1203.) Also it minimizes extradition problems." (*People v. Thrash* (1978) 80 Cal.App.3d 898, 902.) "[T]he condition's limitation on interstate travel is closely tailored to the purpose of monitoring defendant's travel to and from California not by barring his ability to travel altogether but by requiring that he first obtain written permission before doing so." (*Relkin*, at p. 1195.) Thus, the imposition of a travel restriction is not a facial violation of a probationers' right to travel. (*Moran*, at p. 406 ["Although criminal offenders placed on probation retain their constitutional right to travel, reasonable and incidental restrictions on their movement are permissible"].) We therefore conclude that there is nothing facially inappropriate about the contested travel approval condition.

Based on the foregoing, we find the travel approval condition is not unconstitutionally overbroad and it did not unreasonably restrict defendant's right to interstate travel.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
Acting P. J.

We concur:

SLOUGH
J.

FIELDS
J.